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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 649.

Barge "ANACONDA" and SMITH-ROWLAND CO., INC.,
Petitioners,

—against—

AMERICAN SUGAR REFINING COMPANY,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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Of Counsel.

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Statement.

While the respondent is satisfied with the petitioners' formal statement of the case, the respondent does not concede the accuracy of the petitioners' assertions (at p. 6 of their brief) that the form of charter-party involved in this case was prepared by the War Shipping Administration to serve the war needs of the United States; and that in view of the scarcity of shipping the United States drafted the arbitration clause under consideration in this case to obviate the seizure of vessels before arbitration.

The United States is in no way involved in the present case. The fact that "Victor B. Benham, Steamship Agent and Broker", whose name appears at the top of the charter-party (R. 35), or any other party who may have arranged for the printing of the form, chose to print as a heading the words "War Shipping Administration Sugar Charter-Party," we submit affords no support to the petitioners' assertions.

Outline of Argument.

The respondent submits: (1) that the District Court, sitting in admiralty, had jurisdiction of the cause set out in the libel, both *in rem* and *in personam*; (2) that in enacting the United States Arbitration Act, Congress did not divest or seek to divest the District Courts of their admiralty jurisdiction over causes filed by parties claiming damages for breach of maritime contracts containing executory arbitration clauses; (3) that arbitration agreements which purport to divest courts of their admiralty jurisdiction or to abridge that jurisdiction, are void except to the extent that such agreements may be validated by the Arbitration Act; and (4) that the arbitration clause in the charter-party in the instant case, may not properly be construed as a waiver by the respondent of its right to appeal to an admiralty court for redress of its grievance against the petitioners, by either a suit *in rem* or a suit *in personam* with clause of foreign attachment.

POINT I.

The District Court, sitting in admiralty, had jurisdiction of the cause of action described in the libel, both *in rem* and *in personam*.

The respondent submits that the allegations of the libel (R. 2-7) set out a cause of action *in rem* against the barge "Anaconda" and *in personam* against the petitioner, Smith-Rowland Co., Inc., her owner, within the admiralty jurisdiction. No argument to the contrary was advanced either in the District Court or in the Circuit Court of Appeals; nor is it advanced in this Court. The Circuit Court of Appeals held specifically that "The libel sets

out, a cause of action within the admiralty jurisdiction" (R. 50).

The admiralty jurisdiction of the District Court *in rem* was acquired by seizure of the "Anaconda" (Return of U. S. Marshal, R. 22; Opinion of C. C. A., R. 50).

The Resolute, 168 U. S. 437, 439;
Ex parte Indiana Transp. Co., 244 U. S. 456, 457;
The Merrimac, 242 Fed. 572, 574 (S. D. Fla.);
Supreme Court Admiralty Rule 10.

As Smith-Rowland Company, Inc. was not within the Southern District of Florida (R. 11), jurisdiction *in personam* was acquired by seizure of the "Anaconda" as its property, under foreign attachment (R. 24).

Atkins v. *The Disintegrating Co.*, 18 Wall. 272, 297, 303-305;
Birdsall v. *Germain Co.*, 227 Fed. 953 (S. D. N. Y.);
Supreme Court Admiralty Rule 2.

POINT II.

By the enactment of the United States Arbitration Act (9 U. S. C., Secs. 1-15) Congress did not divest or seek to divest the District Courts of their admiralty jurisdiction over causes filed to recover damages for breach of maritime contracts containing executory arbitration agreements.

The provisions of the Arbitration Act make it clear that Congress assumed that aggrieved parties might file suit on contracts containing arbitration clauses made binding by the Act, before resorting to arbitration; and that it did not seek to abridge that right in any way.

Section 3 of the Act (9 U. S. C. sec. 3) provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. Feb. 12, 1925, c. 213, §3, 43 Stat. 883."

Section 8 of the Act (9 U. S. C. sec. 8) provides:

> "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. Feb. 12, 1925, c. 213, §8, 43 Stat. 884."

POINT III.

Any agreement for arbitration purporting to divest or limit the jurisdiction of the Courts, outside the terms of the Arbitration Act, is void.

The petitioners argue that that part of the arbitration provision in the charter-party between the parties to this cause providing "that the provisions of Section 8 thereof"

(of the Arbitration Act) "shall not apply to any arbitration hereunder" (R. 36, par. "Fifteenth"), is an effective and binding agreement between the parties which foreclosed the District Court, on the respondent's application, from seizing the "Anaconda" in accordance with usual admiralty procedure. In effect, therefore, the argument is that the language quoted is a valid and effective agreement ousting the District Court of its jurisdiction over the cause of action set out in the libel for breach of the charter-party, based either on an *in rem* right against the "Anaconda" or on an *in personam* right against her absent owner, jurisdiction over the vessel and her owner being dependent upon seizure.

The Resolute (*supra*);
Ex parte Indiana Transportation Co. (*supra*).

The District Court agreed with the petitioners that its jurisdiction had been ousted by the agreement of the parties (R. 8). The Circuit Court of Appeals held to the contrary (R. 52).

If the clause of the charter-party arbitration provision quoted above may properly be construed to have the meaning for which the petitioners contend, as the Arbitration Act authorizes no such ouster, support for the petitioners' contention that the parties entered into a valid contract ousting admiralty courts of their jurisdiction, must be found in the decisions. But, as the Circuit Court of Appeals pointed out (R. 50), the decisions of the Federal courts are almost unanimous that agreements seeking to abridge a court's jurisdiction in any way are void unless they are validated by statutory enactment.

Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109 at pp. 120 *et seq.*;

Insurance Co. v. *Morse*, 20 Wall. 445, at pp. 451 *et seq.*;

Tatsuuma K. K. K. v. *Prescott*, 4 F. (2d) 670 (C. C. A. 9th Cir.);

Monahan v. *S. S. "Howick Hall"*, 10 F. (2d) 162 (E. D. of La.).

In *Marine Transit Co.* v. *Dreyfus*, 284 U. S. 263, this Court sustained the constitutionality of the United States Arbitration Act because "The general power of the Congress to provide remedies in matters falling within the admiralty jurisdiction of the Federal Courts, and to regulate their procedure, is indisputable" (at p. 278). In that case a libel was filed by a cargo owner against a vessel owner *in personam* and against a tug *in rem*. After answer to the libel had been filed by the respondent-claimant, the libellant moved for reference of the dispute to arbitration in accordance with an arbitration clause in the contract of the parties.

In the present case the respondent concedes, as it has from the start (R. 29), that under the terms of Section 3 of the Arbitration Act, upon their application the petitioners are entitled to have the District Court stay the respondent's suit until arbitration is concluded, *i. e.*, until the remedy provided by the Arbitration Act is applied. The respondent submits, however, that the creation of a remedy by the Arbitration Act, does not affect the admiralty jurisdiction of the District Courts.

Under the petitioners' theory, if a non-resident vessel owner who could not be served personally by process in this country, should charter his vessel to an American cargo owner in this country and the form of charter-party employed should be that under consideration here, the cargo owner, if aggrieved, would have no remedy whatever against the vessel owner in this country either

by way of a suit in admiralty against the vessel *in rem* or *in personam* with a clause of foreign attachment; or indeed by way of arbitration: if the vessel could not be seized as the first step in arbitration, there would be no United States court authorized to issue an order directing arbitration, for there would be no representative of the vessel owner on whom to serve notice of the petition for arbitration as provided for in Section 4 of the Act.

POINT IV.

Section 8 of the Arbitration Act does not confer admiralty jurisdiction on the District Courts. Its purpose is to preserve the right of an aggrieved party to arbitration, in accordance with a contractual, executory arbitration agreement, after he has filed suit in admiralty and obtained security by seizure of the other party's property.

The petitioners urge that Section 8 of the Arbitration Act (9 U. S. C. sec. 8) confers admiralty jurisdiction on the District Courts and is the sole basis of jurisdiction over a cause of action such as that presented here; and that the contractual provision in the charter-party that the provisions of Section 8 "shall not apply to any arbitration hereunder" ousted the District Courts of admiralty jurisdiction over a cause of action for breach of the charter-party.

As the Circuit Court of Appeals pointed out (R. 50, 51) there was admiralty jurisdiction over causes of action such as the present one, long before the Arbitration Act: it was given by the Constitution (Article III, Sec. 2) and the Judicial Code (28 U. S. C. sec. 41, 371).

The true purpose of Section 8 is disclosed by its own

terms: "the party claiming to be aggrieved may begin his proceeding hereunder" (*i. e.*, his proceeding for arbitration under the Act) "by libel and seizure of the vessel * * * according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration * * *."

In *Marine Transit Co. v. Dreyfus*, 284 U. S. 263, this Court considered the Arbitration Act and said (at p. 275):

> "The intent of §8 is to provide for the enforcement of the agreement for arbitration, without depriving the aggrieved party of his right, under the admiralty practice, to proceed against 'the vessel or other property' belonging to the other party to the agreement."

See, also, *The Belize*, 25 Fed. Supp. 663 at p. 665 (S. D. N. Y.).

Were it not for the provisions of Section 8, an aggrieved party who wished to preserve his right to arbitration would be obliged to forego obtaining security by seizure of the other party's property under admiralty procedure, for the filing of suit and seizure would be a waiver of the right to arbitration.

> *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. (2d) 978 at p. 989 (C. C. A. 2nd Cir.);
> *The Quarrington Court*, 102 F. (2d) 916 at p. 919 (C. C. A. 2nd Cir.), cert. denied, 307 U. S. 645;
> *The Belize*, 25 F. Supp. 663 at p. 664 (S. D. N. Y.), appeal dismissed 101 F. (2d) 1005 (C. C. A. 2nd Cir.).

If the charter-party provision in relation to Section 8 of the Arbitration Act has any effect whatever, the re-

spondent submits that its only effect is to foreclose the respondent from itself requiring arbitration of its claim against the petitioners.

CONCLUSION.

The respondent submits that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 649.—October Term, 1943.

Barge "Anaconda" and Smith-Rowland Company, Inc., Petitioners, *vs.* American Sugar Refining Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 24, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

We granted certiorari because this case poses an important question arising under the United States Arbitration Act.[1] The question arises in these circumstances. The petitioner Smith-Rowland Company, Inc., as owner, chartered to the respondent, American Sugar Refining Company, the barge "Anaconda" for a voyage from Havana, Cuba, to Port Everglades, Florida. After arrival at the latter port, the respondent filed in a federal district court a libel in personam against the petitioner with a prayer for process of foreign attachment, and in rem against the vessel, which was seized by the marshal.

Smith-Rowland Company, Inc., appearing specially, excepted to the jurisdiction of the court, relying on a provision of the charter party which was: "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration at the final place of discharge . . . pursuant to the provisions of the United States Arbitration Act . . . *except that the provisions of Section 8 thereof shall not apply to any arbitration hereunder.*" (Italics supplied.)

Section 8 of the Act is: "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel . . . according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

[1] Act of February 12, 1925, c. 213, 43 Stat. 883; Title 9 U. S. C.

The court treated the petitioner's exception as a motion to dismiss, and ordered dismissal[2] on the ground that it was competent to the parties, while availing themselves of the provisions of the Act rendering arbitration agreements enforcible in courts of admiralty, to preclude resort to the usual process of seizure as security for compliance with any arbitral award. The respondent appealed from the order, and the parties entered a stipulation for value pursuant to which the barge was released from the marshal's custody. The Circuit Court of Appeals reversed the judgment.[3] We hold its action was right.

Within the spheres of its operation,—maritime transactions and transactions in commerce, interstate and with foreign nations,—the Arbitration Act rendered a written provision in a contract by the parties to such a transaction, to arbitrate controversies arising thereout, specifically enforceable. Thereby Congress overturned the existing rule that performance of such agreements could not be compelled by resort to courts of equity or admiralty.[4]

After declaring (Section 2)[5] such agreements to be enforceable, Congress, in succeeding sections, implemented the declared policy. By Section 3 it provided that "if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court . . . shall on application of one of the parties stay the trial . . . until such arbitration has been had" if the applicant is not in default in proceeding with such arbitration. The section obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment, if such procedure is available under the applicable law. This section deals with suits at law or in equity. The concept seems to be that a power to grant a stay is enough without the power to order that the arbitration proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration.

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[2] 48 F. Supp. 385.

[3] 138 F. 2d 765.

[4] See Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109; 120-121, 123.

[5] The sections have the same section numbers in Title 9 of the United States Code.

Section 8, that with which we are especially concerned, deals with the admiralty jurisdiction. It has already been quoted. If the cause of action is one cognizable in admiralty, then, though the parties have agreed to arbitrate, "*notwithstanding anything herein* [i.e. in the Act] *to the contrary,*" the party claiming to be aggrieved may begin "his proceeding hereunder by libel and seizure", "according to the usual course of admiralty proceedings", and the court may direct the parties to proceed with arbitration and retain jurisdiction to enter its decree on the award. Here again the Act plainly contemplates that one who has agreed to arbitrate may, nevertheless, prosecute his cause of action in admiralty, and protects his opponent's right to arbitration by court order. Far from ousting or permitting the parties to the agreement to oust the court of jurisdiction of the cause of action the statute recognizes the jurisdiction and saves the right of an aggrieved party to invoke it.

Finally we turn to Section 4, which permits "a party aggrieved by the alleged failure" of his opponent to arbitrate as agreed, to petition any federal court of appropriate jurisdiction at law, in equity or in admiralty, for an order directing that arbitration proceed. Provision is made for framing an issue and trying it as to whether the parties are bound to arbitrate and the entry of an order accordingly. From this provision it is clear that the parties may proceed in an admiralty case without the customary libel and seizure. And it has been so held.[6]

Section 8 says the aggrieved party "notwithstanding" the right granted by Section 4, may begin a suit in admiralty by libel and seizure. Our question is whether the Act contemplates or permits consensual elimination of the procedure thus saved by the Act and contractual confinement of the aggrieved party's resort to a court to a petition for an order to arbitrate under Section 4. We think the answer must be in the negative. Congress may have thought it wise not to raise doubts under the admiralty clause of the constitution. It may have thought that in many causes in admiralty if the aggrieved party could not seize the ship of his opponent, an arbitral award would be wholly unenforceable as the vessel might seldom or never again be within the jurisdiction of our courts. But, whatever its reasons, Congress plainly and emphatically declared that although the parties

[6] The Aakre, 21 F. Supp. 540.

had agreed to arbitrate, the traditional admiralty procedure wit its concomitant security should be available to the aggrieve party without in any way lessening his obligation to arbitrat his grievance rather than litigate the merits in court.

It is enough that Congress has so declared. We think a part can not stipulate away such a jurisdiction which the legislatio declares open as heretofore.

The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.